Supreme Court, U.S.
FILED
JUL 21 1993
OFFICE OF THE CLERK

(3)

No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

HOWARD A. BELODOFF
Counsel of Record
Idaho Legal Aid Services, Inc.
P.O. Box 913
Boise, Idaho 83701
(208) 336-8980

ROBERT J. MCCARTHY
Idaho Legal Aid Services, Inc.
P.O. Box 973
Lewiston, Idaho 83501
(208) 743-1556

Counsel for Respondent

July, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the Indian Child Welfare Act permit a state court to determine that the Act applies to a child custody proceeding when the child's Indian tribe has not yet made a final determination as to whether the child is enrollable?

2. Does the Indian Child Welfare Act apply to the involuntary termination of parental rights of an Indian father, and the placement of an Indian child born out of wedlock to a non-Indian mother, who immediately after birth placed the child with non-Indian parents and voluntarily terminated her parental rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 8

I. THE IDAHO SUPREME COURT DID NOT INTERFERE WITH A TRIBE'S INTERNAL PROCESSES REGARDING WHETHER A CHILD IS OR IS NOT ELIGIBLE FOR MEMBERSHIP 8

II. THE IDAHO SUPREME COURT IS IN ACCORD WITH THE UNITED STATES SUPREME COURT AND WITH STATE COURTS OF LAST RESORT IN RULING THAT THE ICWA APPLIES TO THE INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF AN INDIAN FATHER AND THE PLACEMENT OF AN INDIAN CHILD WITH NON-INDIAN PARENTS WITHIN A FEW DAYS OF THE CHILD'S BIRTH 16

CONCLUSION 29

APPENDIX

Notice to Parent 1a

Order of Adoption 2a

Constitution and Bylaws of the Oglala Sioux Tribe 5a

June 12, 1992, Certificate of Enrollment 7a

TABLE OF AUTHORITIES

Page

CASES:

Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78 (1918) 29

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 24

Application of Angus, 655 P.2d 208 (Or. App. 1982), *rev. denied*, 660 P.2d 683, *cert denied sub. nom. Woodruff v. Angus* 464 U.S. 830 (1983) 14

Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987) 22

Ex parte Pero, 99 F.2d 28 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1938) 10

In re Adoption of Halloway, 732 P.2d 962 (Utah 1986) 19, 24

In re Adoption of Lindsay C., 280 Cal. Rptr. 194 (Cal. -Ct. App. 1991) 20, 21

In re Adoption of M., 832 P.2d 518 (Wash. Ct. App. 1992) 26

In re Crystal K., 276 Cal. Rptr. 619 (Cal. Ct. App. 1990) 21

In re D.M.J., 741 P.2d 1386 (Okla. 1985) 27

In re Junious M., 193 Cal. Rptr. 40 (Cal. Ct. App. 1983) 20

In re Kahlen W., 285 Cal. Rptr. 507 (Cal. App. 5 Dist. 1991) 15

Matter of Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988) 14, 24

Matter of Adoption of Baade, 462 N.W. 2d 485 (S.D. 1990) 22

TABLE OF AUTHORITIES – Continued

Page

Matter of Adoption of Baby Boy D, 742 P.2d 1059 (Okla. 1985) 27

Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) 16, 22, 24, 25

Matter of Adoption of Crews, 825 P.2d 305 (Wash. 1992) 25, 26

Matter of Adoption of T.N.F., 781 P.2d 973 (Alaska 1989), *cert denied, sub nom. Jasso v. Finney*, 490 U.S. 1030 (1990) 21

Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988), *cert denied, sub nom., J.Q. v. D.R.L.* 490 U.S. 1069 (1989) 27

Matter of Coconino County Juvenile Action No. J-10175, 736 P.2d 829 (Ariz. Ct. App. 1987) 24

Matter of S.C., 833 P.2d 1249 (Okla. 1992) 27

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) ..... *passim*

Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993) 22

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 11

United States v. Antelope, 430 U.S. 641 (1977) 10

MISCELLANEOUS:

Constitution and Bylaws of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, Article II, Section 1 12

TABLE OF AUTHORITIES – Continued

Page

Department of Interior, Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," (hereinafter BIA Guidelines) Fed. Reg. Vol. 44, No. 228, Monday, November 26, 1979 ..... *passim*

Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901, *et seq.* ..... *passim*

Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 11

No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari
To The Idaho Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Baby Boy Doe (hereinafter child) was born on September 18, 1989. (9sa.)[1] The parents, Brenda Davis and Jeff Not Help Him, have never been married. (2a.) Jeff Not Help Him is an enrolled member of the Oglala Sioux Tribe (hereinafter Tribe). (3sa.) At the time of the birth the father resided, and continues to live and own land, on the

[1] References to the Petitioners' Appendix and Supplemental Appendix to the Petition for Certiorari are denoted by a page number followed by "a" and "sa" respectively. References to the record are denoted as "R" followed by a page number.

Pine Ridge Reservation in Pine Ridge, South Dakota.[2] Brenda Davis is non-Indian. (2a.) Petitioners, Leland and Carla Swenson, are non-Indians who, on September 21, 1989, obtained physical custody of the child from the child's mother and transported him to Idaho without the knowledge and consent of Jeff Not Help Him. (2a.) The mother and the Petitioners kept the birth of the child, their place of residence, and the consent to adopt the child from the father and Tribe for four months following the birth.[3]

---

[2] The Petitioners' assertion that the father had left the reservation many years before is misleading. (Pet'r Pet. at 10.) While it was true that he had resided off the reservation to attend school for several years, he was a resident at the time of the birth of the child and continued to own land on the reservation. The Petitioners' assertions regarding the father's other children's contact with him, his family, or tribe are false. The testimony at the hearing was that the children had stayed with the father and his family on the reservation and that after the family left, repeated attempts by the family were made to keep in contact with them. The family offered to take the children, who resided in Utah, for the summer so they could be exposed to the Indian culture. However, these attempts were repeatedly denied or discouraged by the father's estranged ex-wife. (Tr. 108-9.) The ex-wife eventually remarried and did not notify the family of her new name or address. (Tr. 140-142.)

[3] The Petitioners have misstated the facts which were presented at trial. (*See* Pet'r Pet., 10-11.) The mother never testified in the parental termination proceeding. There was no testimony regarding how she selected the adoptive parents. The child's aunt testified that she and the child's other aunt attempted more than once to telephone the mother in the month preceding the birth after they learned she was not going to keep the child. (Tr. 107-8.) The family wanted to tell the mother that they would take the child to live with them. (Tr. 107.) The mother refused to take or return the telephone calls and the family was only told the mother had moved to California.

On October 11, 1989, the mother, while living in California, signed a Consent to Adoption and a Termination of Parental Rights, which were filed with the trial court on October 27, 1989. (R. 4-5.) The mother consented to the complete termination of her parental rights and waived her right to a hearing. On January 18, 1990, the Petitioners filed a Petition to terminate the parental rights of Jeff Not Help Him. (R. 1-3.) On January 18, 1990, the Petitioners served a Notice to Tribe, pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* (hereinafter ICWA), notifying the Tribe that the child may be an eligible member and that the Petitioners were seeking to adopt him. On January 18, 1990, the Petitioners served the father with a Notice to Parent, pursuant to ICWA, at his residence in Oglala, South Dakota. (Resp't. App. 1a.) The notice was the first time the father was notified that the Petitioners had custody of the child in Idaho and were seeking to adopt the child.

Less than three weeks later, on February 8, 1990, a representative of the Tribe's Indian Child Welfare Center appeared at a hearing and advised the Court that the father wanted custody of the child and that the Tribe wanted to intervene and have the proceedings transferred to tribal court pursuant to the ICWA. (3a.) (R. 13-15.) On February 9, 1990, Petitioners' counsel, on behalf of the mother, filed a formal objection to the transfer of the proceedings to the Pine Ridge Tribal Court pursuant to the ICWA, 25 U.S.C. § 1911(b). (R. 16.)

On April 4, 1990, the Tribe filed amended motions to intervene and to transfer the proceedings to the Oglala Sioux Tribal Court on the grounds that the child was an "Indian child" as defined by the ICWA and "he is eligible for membership in the Oglala Sioux Tribe because his

natural father, Jeffrey Not Help Him, Pine Ridge, South Dakota, is a full-blood Oglala Sioux and he is enrolled with the number U-21740." (R. 41-44.) On May 3, 1990, the trial court granted the Tribe the right to intervene under 25 U.S.C. § 1911(c). (3a.) The trial court also indicated the proceeding would be governed by the ICWA based upon a letter from the enrollment director that the father had applied to enroll the child. (3a.) The trial court found that the letter "was a determination by the tribe that the child was eligible for membership in the tribe." (3a.) On May 21, 1990, the trial court heard testimony solely regarding the termination of the father's parental rights. (3a.) The Tribe presented testimony regarding their plan to place the child for adoption with his paternal aunt and uncle, who were tribal members living on the reservation. (3a-4a.) The Tribe argued that the ICWA applied to the termination proceeding and the child should be placed within the tribal community. (3a-4a.)

On June 7, 1990, the trial court ruled that although the father was a tribal member, "the child was not an 'Indian child' as defined in ICWA, because the child was not eligible for membership in the tribe." (4a.) The trial court held that the ICWA did not govern the proceedings and terminated the father's parental rights without applying the requirements of the ICWA. (4a.) The trial court relied upon the BIA Guidelines which "advise state courts to treat determination by an Indian Tribe regarding eligibility for membership in the tribe as conclusive." (4a.)[4] The trial court, construing an affidavit from the

---

[4] *See* Department of Interior, Bureau of Indian Affairs, "Guidelines for State Courts: Indian Child Custody Proceedings," (hereinafter BIA Guidelines) Fed. Reg. Vol. 44, No. 228,

enrollment director on the father's enrollment application for the child, held that the Tribe had declined to find the child eligible for membership and this meant the Tribe had conclusively determined the child was not eligible for membership. (4a.) The trial court concluded that pursuant to the BIA Guidelines, the Tribe's failure to make a final determination regarding eligibility for enrollment was conclusive and the ICWA was not applicable to the proceedings. (4a.)

The trial court also adopted an alternative legal theory, the "existing Indian family" test, to support its ruling that the ICWA did not apply to the termination proceeding. (4a.) The trial court ruled the ICWA only applied where an Indian child was removed from an existing Indian family. (4a.) The trial court concluded that even if the child met the definition of "Indian child," the "ICWA did not apply where a child had never lived within the Indian community or had never been exposed to Indian culture." (4a.) The trial court found that in this case the child had not been removed from an existing Indian family because the child's mother, a non-Indian, had given physical custody to the non-Indian adoptive parents since birth. (4a-5a.) This finding was made despite the fact that the mother had concealed herself in California, had given consent to adoption, and given up physical custody to the Petitioners without the father's knowledge or consent, and never sought to establish a legal guardianship for the child.

Monday, November 26, 1979. The BIA Guidelines are the Department's interpretation of the ICWA and are not binding on state courts. *Id.* at 67584.

The trial court ignored the fact that less than three weeks had passed after the Petitioners served notice of the placement before the tribal representative traveled from South Dakota to Idaho in order to assert the father's and Tribe's right to custody and notified the court of the plans to place the Indian child with his aunt and uncle on the reservation. *See supra*, at 2. On June 7, 1990, the trial court entered an order terminating the parental rights of the father, rejecting the applicability of the ICWA, and employing the state's clear and convincing evidence standard rather than the beyond a reasonable doubt standard under the ICWA. 25 U.S.C. § 1912(f). (14a.)

The Petitioners' assertion that the hearings on the petition to terminate parental rights and the adoption were voluntary and consolidated by the trial court and their presentation of the issues at the termination hearing are incorrect. The termination of parental rights and the adoption hearings were completely separate involuntary proceedings. On June 19, 1990, the trial court held an adoption hearing in which the Tribe was not represented nor given the opportunity to present evidence. (14a.) The trial court never addressed the preferences for adoptive placement. *See* 25 U.S.C. § 1915(a). (14a.)[5] The trial court

---

[5] The Respondent finds the Petitioners' assertion that the Tribe's counsel's prior presentation at the termination proceeding and their subsequent presence at the adoption hearing after the trial court's ruling that the ICWA was inapplicable to the parental termination proceeding gave the Tribe an opportunity to present evidence of the ICWA placement preferences in the adoption proceeding disingenuous. It was the Petitioners who successfully argued on appeal to the district court that attorney's fees should be awarded because of the Tribe's continuing assertion that the ICWA applied to the case was frivolous, unreasonable, and without foundation. (4a-5a.)

also failed to apply the ICWA's preference standard pursuant to 25 U.S.C. § 1915(d) of, "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides with which the parent or extended family members maintain social and cultural ties." (Resp't App. 2a-4a.)

The Tribe appealed the trial court's decision to the district court. (5a.) The district judge affirmed the trial court but on different grounds. (5a.) "The district judge held the child was not an Indian child because there was insufficient proof of paternity in the record to support a finding that the child was a legal child of the father." (5a.) The district judge awarded the Petitioners $8,500 in attorney's fees and costs finding that the Tribe's continuing arguments on appeal that the ICWA had to be applied were frivolous, unreasonable, and without foundation. (5a.)

The Idaho Supreme Court found that the record contained sufficient evidence to establish the Indian child's eligibility for membership as well as the father's paternity. (10a.) The court held that if a state court does not have a conclusive determination from the tribe or the BIA, the trial court must make its own determination regarding the child's eligibility for tribal membership for purposes of the ICWA. (11a.) The court, relying on this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), rejected the judicially created exception of an existing Indian family requirement under the circumstances present in this case. (12a.) The Idaho Supreme Court vacated the termination order, and remanded the case to the trial court for further proceedings to comply with the ICWA. (15a.)

REASONS FOR DENYING THE WRIT

I. THE IDAHO SUPREME COURT DID NOT INTERFERE WITH A TRIBE'S INTERNAL PROCESSES REGARDING WHETHER A CHILD IS OR IS NOT ELIGIBLE FOR MEMBERSHIP.

The ICWA was enacted in recognition of the federal government's responsibility to the Indian people "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . . " 25 U.S.C. § 1902.[6] Congress recognized the United States' special relationship with and federal responsibility to Indian people finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children. . . . " 25 U.S.C. § 1901(3). Congress further recognized that by sanctioning the separation of Indian children from their ancestral peoples and lands, states were eroding the foundation of tribal existence. "[T]he States . . . often fail to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in the Indian communities and families." 25 U.S.C. § 1901(5). Separations of Indian children from their parents and tribes by the states

---

[6] 25 U.S.C. § 1902 specifically states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

are no less effective at destroying tribal life than the brutal massacres of the past.

Part of the protection to be accorded Indian children pursuant to the federal government's "special relationship" with the Indian tribes is the assurance that Indian children will not be kept apart from their Indian families and culture and placed or adopted into a non-Indian environment. The Congressional policy in addressing this problem is perhaps the most clearly stated in the BIA Guidelines for application of the ICWA:

> (1) Congress through the Indian Child Welfare Act has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes. Proceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to these preferences. The Indian Child Welfare Act, the federal regulations implementing the Act, the recommended guidelines and any state statutes, regulations or rules promulgated to implement the Act shall be liberally construed in favor of a result that is consistent with these preferences. Any ambiguities in any of such statutes, regulations, rules or guidelines shall be resolved in favor of the result that is most consistent with these preferences.

Id. at 67585-86, A.*Policy*.

The ICWA defines an Indian child as an unmarried person under eighteen years of age who is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a

member of an Indian tribe. 25 U.S.C. § 1903(4). Congress' use of the terms "member" and "membership" in the ICWA rather than the terms "enrollment" is purposeful. While enrollment in a tribe is the most commonly used criteria for membership, it is not the only one.[7] Maintaining tribal relations and being recognized as an Indian by the community have also been used to determine membership. *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1938); *see United States v. Antelope*, 430 U.S. 641, 646 (1977). Therefore, if it is determined that an Indian child or parent is not enrolled in a tribe, an investigation must still be made into whether they can be considered a member of the tribe.[8]

---

[7] "Enrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but it is not the only means nor is it necessarily determinative. *United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979)." BIA Guidelines, 44 Fed. Reg. 67586 B.1. Commentary.

[8] BIA Guidelines at B.1.(c) in part states:

> (c) Circumstances under which a state court has reason to believe a child involved in a child custody proceeding is an Indian include but are not limited to the following:
>
> (i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.
>
> (ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child.
>
> . . . .
>
> (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian

The Idaho Supreme Court ruling correctly applied the "Indian child" requirement of the ICWA and did not interfere with a tribe's internal processes regarding membership. As explained by the court, a factual determination that a child is eligible for membership in a tribe, and thus comes within the protection of ICWA, in no way obligates the tribe to enroll the child. The Petitioners' argument equates enrollment with membership. The Idaho Supreme Court, at 10a, carefully distinguished "eligibility for membership" from the administrative function of "enrollment."

> If a state court does not have a conclusive determination from the tribe or the BIA regarding a child's eligibility for tribal membership, the trial court must make its own determination regarding the child's eligibility for tribal membership.

Indeed, the very case upon which Petitioners rely, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), ensures that a state court cannot impose its determination on a tribe to require enrollment. This Court held in *Santa Clara Pueblo* that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, was not a Congressional waiver of tribal immunity from suit in federal court. *Id.* at 59. This Court also noted that Congress has plenary authority to modify tribal powers of local self-government. *Id.* at 56. The Court in no way implied that through legislation, such as ICWA, Congress may not permit state courts to make

---

is known by the court to be or is shown to be a predominantly Indian community.

factual and legal findings regarding a child's eligibility for tribal membership, for purposes of applying the protection of ICWA to the child and to the tribe. Rather, this Court stated that "the *judiciary* should not rush to create *causes of action* that would intrude on . . . [a] tribe's right to define its own membership *for tribal purposes.*" *Id.* at 72, n.32 (emphasis added).

There can be no dispute in this case that the Tribe considers the child in fact eligible for membership.[9] The Idaho Supreme Court found the evidence clearly established the child's eligibility for membership. The Idaho Supreme Court correctly refused, as argued by the Petitioners, to read the ICWA and the BIA Guidelines as imposing "a requirement that a tribe reach a conclusive determination regarding a child's eligibility for membership as a prerequisite to application of ICWA." (10a.) The Idaho Supreme Court held that the enrollment director's affidavit was "clearly not a 'determination' as intended by the BIA guidelines." (10a.) The Idaho Supreme Court found "[t]here was no evidence in the record to support a finding that the tribe determined the child is not eligible for tribal membership" despite the Petitioners' continued assertion to the contrary. The Idaho Supreme Court noted that the affidavit of the Tribe's enrollment director did not state that the child was ineligible for membership, but

---

[9] The Constitution of the Oglala Sioux Tribe states that:

> The membership of the Oglala Sioux Tribe shall consist as follows: . . . (b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.

Constitution and Bylaws of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota, Article II, Section 1. *See* Respondent's Appendix at 5a.

rather that although the father met the primary considerations for enrollment, that is residency and land ownership, the enrollment committee lacked the documentation necessary, a birth certificate from the mother, to proceed with the application and the vote to make a conclusive determination of eligibility for enrollment at that time. (10a-11a.)

The plain intent of Congress as expressed in the ICWA was to include within its protection a child who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Congress included *both* children who are members of a tribe and those who are eligible for membership and have a biological parent who is a member of a tribe. The definition of "Indian child" used by Congress ensures broad application of the ICWA protections rather than restricting them to a short time frame or subject them to the actions of a non-Indian parent who may seek to circumvent the substantive and procedural provisions.

The impediments which prevented the enrollment of the child were not caused by the Tribe and could not be overcome in the short time before the termination hearing, if at all, considering the mother's and the Petitioners' attitudes toward the Tribe and an adoption by an Indian family living on the reservation. Congress recognized and anticipated that circumstances would arise where a natural parent's failure to cooperate would prevent completion of an enrollment application or final decision being made because it defined "Indian child" as being either a member or eligible for membership. A narrower definition requiring enrollment would be inconsistent with the Congressional intent to preserve Indian tribes by preventing the separation of Indian children from their tribes and

culture. To permit the natural mother's prevention of enrollment as a basis for a state court decision that the ICWA is inapplicable because a child is not an "Indian child" until an enrollment determination can be made also runs counter to the *Holyfield* rule that the ICWA is not to be circumvented due to mere technicalities. *Holyfield*, at 49. The child has since been enrolled. *See* Respondent's Appendix 6a-7a, June 12, 1992, Certificate of Enrollment.

The Idaho Supreme Court decision is supported by several state court opinions which have noted the obligation of the trial court to determine whether the child is an "Indian child" by considering the evidence which can realistically be provided by the tribe rather than relying solely on a final administrative determination on enrollment.

In *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), the Supreme Court of New Jersey held that a tribe's refusal to enroll a child as a member of the tribe is not determinative of the child's status as an "Indian child" under the ICWA. The court ruled ICWA would still apply where the tribe's decision was based on uncertain ancestry because at the time an affidavit of paternity had not been filed. The court held, that "the tribe's current refusal to enroll Baby Larry is not determinative of his status as an Indian child under the ICWA" and "we are satisfied that Congress intended that a child's eligibility for tribal membership be a question of fact dependent on his or her actual ancestry." *Id.* at 933.

In *Application of Angus*, 655 P.2d 208 (Or. App. 1982), *rev. denied*, 660 P.2d 683, *cert denied sub. nom. Woodruff v. Angus* 464 U.S. 830 (1983), the Oregon Court of Appeals upheld a trial court's finding that the ICWA applied to a

child custody proceeding when the father was a member of a tribe and the child was found by the trial court to have met the tribe's membership requirements, although not formally enrolled at the time of the proceeding. The court held since formal membership requirements may differ between tribes, "[t]here is thus no one method of proof of membership, but the testimony of a representative of tribal government would be probative evidence of membership." *Id.* at 212.

In *In re Kahlen W.*, 285 Cal. Rptr. 507 (Cal. App. 5th Dist. 1991), the California Court of Appeals held that a tribal determination of enrollment is not required to establish "Indian child status" for purposes of applying the ICWA. *Id.* at 513. The court also ruled that the parent's failure to provide an enrollment number in the tribe is irrelevant, noting that "[p]arents are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe and those of each other." *Id.* at 513. The court noted further that enrollment is not the only means of establishing Indian status. *Id.* at 513-14. Finally, the court recognized that a child has an "independent right" which must be protected regardless of her mother's action or inaction, because the ICWA is based on a presumption that the best interests of the child is not to be separated from the tribe. *Id.* at 514.

The Idaho Supreme Court decision recognized and strictly applied the procedural requirements and substantive provisions of the ICWA as expressed by Congress. The court did not violate principles of tribal sovereignty or interfere with the Tribe's internal processing regarding membership. The Idaho Supreme Court's decision was

completely in accord with the views expressed by the Tribe in this case.

II. THE IDAHO SUPREME COURT IS IN ACCORD WITH THE UNITED STATES SUPREME COURT AND WITH STATE COURTS OF LAST RESORT IN RULING THAT THE ICWA APPLIES TO THE INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OF AN INDIAN FATHER AND THE PLACEMENT OF AN INDIAN CHILD WITH NON-INDIAN PARENTS WITHIN A FEW DAYS OF THE CHILD'S BIRTH.

The Petitioners are requesting that the Court distinguish between Indian children who have already been a part of an Indian family, and those who, whether from circumstances of birthplace or parental subterfuge, have never lived with their Indian family or tribe. Some courts in the past have reached conflicting decisions on the question of whether or not this "existing Indian family" requirement is a valid one.

In *Matter of Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), the court held that ICWA does not apply to "an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be." The court viewed the ICWA as being concerned only with "removal of Indian children from an existing Indian family unit." *Id.* at 175.

The Idaho Supreme Court rejected the trial court's conclusions that because the child was not being removed from an existing Indian family and had never lived within the Indian community or been exposed to the Indian culture since his birth, the ICWA did not apply in this case. (4a-5a.) The Idaho Supreme Court, at 12a,

refused to apply the existing Indian family requirement because:

> In this case, application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family. This would undermine the tribe's interest in its Indian children, which the Supreme Court recognized in *Mississippi Choctaw*.

The Idaho Supreme Court decision is in agreement with a separate and more recent line of cases rejecting the "existing Indian family" exeception. The court held that Congress had specifically limited a state court's power to circumvent the protective procedures and evidentiary standards contained in the ICWA for Indian children. (12a.) The court held it to be "inappropriate to use a judicially created exception to circumvent the mandates of ICWA." (12a.)

The Idaho Supreme Court was concerned that a non-Indian parent could circumvent the ICWA *and* the tribe's interest in the child by making sure the child was kept away from the reservation and out of contact with the Indian parent and family. (12a.) Their concerns were justified in the present case because the mother rebuffed the father's family's attempts to contact her prior to the child's birth in order to take custody of the child after they learned the baby would be placed for adoption. The mother moved to California to have the baby so as to avoid the Indian family and secretly made arrangements to have the Petitioners adopt the child. The first knowledge the Tribe, the father, or his family had of the child's whereabouts was when they received notice four months

later that the Petitioners had filed a parental termination proceeding in Idaho.

In *Holyfield*, 490 U.S. at 54, this Court upheld application of the ICWA even though the children had never lived in an Indian home or on an Indian reservation prior to being placed with non-Indian prospective adoptive parents. The Court was concerned with the jurisdiction of the tribal court, and thus with the domicile of the parents. The Court noted that the ICWA addresses jurisdiction concerning Indian children not domiciled on the reservation by establishing standards for state court proceedings. *Id.* at 36, n.6. Thus, Congress intended the ICWA to apply to children domiciled away from an Indian Tribe, Indian reservation, and, presumably, an Indian extended family.

Holyfield states that "permitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would, to a large extent, nullify the purpose the ICWA was intended to accomplish." *Id.* at 52. Permitting a non-Indian parent to defeat not just tribal jurisdiction, but application of the entire Act by avoiding the tribal environment, would have exactly the same effect.

This Court recognized in *Holyfield* that in enacting the ICWA, "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.* at 49. The Court discussed the underlying objectives of the ICWA which require a recognition of the interest of an Indian tribe in keeping its children, as distinct from the interests of the Indian child's parent, which may differ from the tribe's. The Court specifically adopted the holding of the Utah Supreme Court that "[t]he protection of this tribal

interest is at the core of the Indian Child Welfare Act, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52-53, quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986).

A requirement that an Indian child live on the Indian reservation or within an existing Indian family to enjoy the protection of the ICWA, where the child's non-Indian parent may have taken steps to see that the child was placed outside the Indian community at birth, is contrary to the purposes and objectives of the ICWA as construed by this Court in *Holyfield*.[10] This Court recognized that protecting the rights of Indian tribes and Indian children, even where these might be in conflict with the interests of Indian parents, is an important end to be achieved by the ICWA. The Court quoted a state court decision that "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Id.* at 50 n.24, quoting *In re Appeal in Pima County, Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. 1981). Clearly *Holyfield* would dictate that protecting the rights of the Tribe and the child in this case should prevail even where they are in conflict with the non-Indian mother's desires.

---

[10] This Court, in *Holyfield* at 50, quoted favorably from a 1977 report of the American Indian Policy Review Commission, which stated that separation of Indian children from their tribes "seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." *Holyfield* makes clear that these evils are to be guarded against in voluntary as well as involuntary removal of Indian children from their cultural setting. *Id.* at 50 and n.25.

In *In re Junious M.*, 193 Cal. Rptr. 40, 46 (Cal. Ct. App. 1983), the court held that a child has the right to develop an Indian identity even where he or she has not, to that time, lived in an Indian home.[11] The Court of Appeals refused to follow the existing Indian family exception and concluded that prior residence within an existing Indian family was not critical to application of the ICWA so long as the child was an Indian child and the child custody proceeding was a proceeding as defined by the ICWA.

The California Court of Appeals recently criticized the rationale which created an "existing Indian family unit" exception to the ICWA when there are "adoption proceedings involving an illegitimate Indian child who has never been a member of an Indian home or Indian culture, and who is being given up by his or her non-Indian mother." *In re Adoption of Lindsay C.*, 280 Cal. Rptr. 194, 198 (Cal. Ct. App. 1991). The California Court noted that "*Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny."[12] *Id.* at 199.

---

[11] The California Court of Appeals in *Junious M.* held that "[e]ven if judicial creation of exceptions to the Act were permissible, creation of one where the child has been deprived of development of an Indian identity would not be appropriate.... [A] major purpose of the Act would be undermined by such an exception." *Id.*

[12] The court in *Lindsay* reviewed the *Baby Boy L.* decision and the other decisions which had adopted its analysis. The court, citing a law review article, stated:

> As noted, *Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny. As stated by one legal scholar, "After the decision in *Holyfield*, it appears that the Kansas court in *Baby Boy L.* may have given inappropriate weight to the wishes of the family. The United States

The California Court of Appeals in *Lindsay* also relied heavily on *In re Crystal K.*, 276 Cal. Rptr. 619 (Cal. Ct. App. 1990). The court in *In re Crystal K.* disapproved the "existing Indian family" exception, concluding that any view "(l)imiting the Act's applicability solely to situations where non-family entities physically remove Indian children from actual Indian dwellings depreciates the very links – parental, tribal and cultural – the Act is designed to improve. *Id.* at 625.

In *Matter of Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989), *cert denied, sub nom. Jasso v. Finney*, 490 U.S. 1030 (1990), the Alaska Supreme Court criticized those cases which had recognized an Indian family exception to the ICWA, stating that:

> Reliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protections set out in ICWA.
>
> . . . .
>
> Moreover, these judicially-created exceptions to the coverage of ICWA are somewhat suspect in light of the Act's purpose of imposing

---

> Supreme Court seems unlikely to protect the *implied* right of the non-Indian mother to entirely exclude the applicability of the Act which *explicitly* protects the right of a tribe to intervene in any child custody proceeding involving an Indian child." (Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary* (1989) 34 S.D.L.Rev. 660, 671)

In re Adoption of Lindsay C., supra at 199 (emphasis in original).

> federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities.

Id. at 977-78.

In *Matter of Adoption of Baade*, 462 N.W. 2d 485 (S.D. 1990), the South Dakota Supreme Court explicitly rejected the rationale of the *Baby Boy L.* decision and its own earlier opinion in *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987), which had adopted an existing Indian family exception. *Id.* at 489. The Court ruled that:

> Consequently, it is incorrect, when assessing ICWA's applicability to a particular case, to focus only upon the interests of an existing family. *See* Note, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, 38 Cath. U.L.Rev. 511, 534 (1989). ("In light of the legislative history of the ICWA, the existing Indian family theory is thus contrary to the intent of Congress." (footnotes omitted).) Such a practice fails to recognize the legitimate concerns of the tribe that are protected under the Act. *See* Tellinghuisen, *supra* at 666 ("*Holyfield* also carries the clear message that [ICWA] would be read liberally, perhaps creatively, to protect the rights of the tribe even against the clearly expressed wishes of the parents. . . . ")

Id. at 489-490.

In *Quinn v. Walters*, 845 P.2d 206 (Or. Ct. App. 1993), the court rejected the imposition of an "existing Indian cultural setting" requirement noting that:

> [A]s a matter of *state* law, a requirement to ICWA that *Congress* did not impose; *i.e.*, that a child who meets the ICWA definition of "Indian

> child" is nonetheless not protected by ICWA, unless the child is being removed from an existing Indian cultural setting. (Citation omitted.)
>
> That is directly in conflict with the idea of tribal sovereignty and the policy of improving tribal ties reflected in ICWA. It also involves exactly the type of state court interference that ICWA was intended to protect against. If ICWA does not apply because the parent is not "Indian" enough for a particular state court, the protection afforded to the child, the parents *and the tribe* is defeated.

Id. at 208-09 (emphasis in original).[13]

---

[13] The court in *Quinn* at 209 n.2, further stated its reasons for rejecting the state imposed exceptions:

> If the tribe has a right to intervene, or to assert jurisdiction of its own court, it may well decide that a child who meets the definition of Indian child, although born of parents who are not in an "existing Indian cultural setting," should be returned to the tribe rather than being placed in a non-Indian adoptive home. That is the tribe's, not the state court's, decision. Engrafting a new requirement into ICWA that allows the dominant society to judge whether the parent's cultural background meets its view of what "Indian culture" should be puts the state courts right back into the position from which Congress has removed them. That would be especially ironic, in that one of the reasons that the parents may not be involved in their Indian culture could be the very policies of removal of Indian children that ICWA was intended to counteract. *See Mississippi Band of Choctaw Indians v. Holyfield, supra,* 490 U.S. at 50 n. 25, 109 S.Ct. at 1609 n. 25. If state courts impose their own value system on these decisions, the tribes will never be able to regain members who have been lost because of earlier government policies.

The trend in the cases even prior to *Holyfield* was to not create judicial exceptions to the ICWA. The Arizona Court of Appeals, in *Matter of Coconino County Juvenile Action No. J-10175*, 736 P.2d 829 (Ariz. Ct. App. 1987), refused to dispense with the protections of ICWA simply because the child had not been living in an Indian home. The court held that "[w]hen the Act is read as a whole, it is clear that Congress had made a very strong policy choice that Indian children, including those who have a non-Indian parent, belong to an Indian home." *Id.* at 832. The Utah Supreme Court likewise found the ICWA applicable although the child had been living in a non-Indian environment. *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986). The New Jersey Supreme Court, in *Matter of the Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988), also held that the ICWA should apply even where the child has never lived with an Indian family or in an Indian environment.

The state courts which have addressed the issue under similar circumstances, especially since *Holyfield*, are thus in accord with the Idaho Supreme Court. This Court should not entertain Petitioners' invitation to create a judicial exception to the application of the ICWA under the circumstances of this case. The only exceptions recognized in the ICWA concern divorce and delinquency proceedings. *See* 25 U.S.C. § 1903. The Court should apply the basic rule of statutory construction which is that express exceptions in a statute exclude all other exceptions. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

Petitioner argues that *Baby Boy L.* has been followed by the Supreme Courts of the states of Oklahoma and

Indiana, and the Court of Appeals of the State of Missouri. All of the decisions cited by Petitioners pre-date *Holyfield*, with the exception of more recent decisions in Washington and Oklahoma. These decisions are not applicable to the circumstances presented to the Idaho Supreme Court and therefore do not support Petitioners' position that the decisions of these states are in conflict.

The court, in *Matter of Adoption of Crews*, 825 P.2d 305, 311 (Wash. 1992), cautioned that its holding was limited to "the narrow circumstances presented by the facts of this case." The *Crews* decision cites, but does not specifically overturn, a previous ruling of the Washington State Court of Appeals which explicitly rejected the Indian family exception. *Id.* at 310, citing *In re Custody of S.B.R.*, 719 P.2d 154, 156 (Wash. Ct. App. 1986).

In *Crews*, the mother and father, after selecting a private adoption agency, receiving counseling, and selecting the adoptive parents, gave their voluntary consent to the adoption. *Id.* at 307. The application of the ICWA was never an issue prior to the adoption. After the state court approved the adoption the mother attempted to reinstate her parental rights by contending the ICWA should have been applied to the adoption. The mother did not and had never lived on a reservation. *Id.* at 310. She was totally unaware and uninterested in her Indian ancestry until after the adoption became final. *Id.* at 308. Neither the mother nor her family regularly participated in any Indian practices and events. *Id.* at 308.

The Washington Supreme Court, after considering the *Holyfield* decision, decided that the ICWA was not applicable "when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the

parents nor their families have resided or plan to reside within a tribal reservation. *Crews*, 825 P.2d at 310.

The *Crews* decision does not support the Petitioners since the Tribe intervened in the present action immediately after being notified that the ICWA may be applicable, prior to the involuntary termination of the father's rights. The father is an enrolled tribal member residing on the reservation. The Tribe proposed to place the child on the reservation with his paternal aunt and uncle who are tribal members and active in the traditional and cultural affairs of the Tribe. This case does not meet the criteria established by *Crews* that the parent have no substantive ties "to a specific tribe" and that there are no plans for the child to reside within a reservation.

More recently, the Washington State Court of Appeals affirmed the limited scope and meaning of the *Crews* analysis. The Court of Appeals held that the ICWA applied to a child even though both parents consented to the adoption and the Indian parent had not lived on the reservation since he was a small child. *In re Adoption of M.*, 832 P.2d 518, 519 (Wash. Ct. App. 1992). The Court held that *Crews* was distinguishable because the father, as a child, had been removed from the reservation and placed in a non-Indian home and the "application of the ICWA to M might result in M being placed on the reservation with an Indian aunt." *Id.* at 521-22. The circumstances in the present case are similar to *Adoption of M.* rather than the "narrow circumstances" presented in *Crews*. The father's sister, the child's aunt, and her husband, have anxiously awaited the opportunity to take custody of the child in order to return him to their Indian family and reservation. Therefore the Idaho Supreme

Court decision is consistent with the current interpretations of the ICWA by the appellate courts of Washington State.

The Petitioners' reliance on the decision in *Matter of S.C.*, 833 P.2d 1249 (Okla. 1992) is misplaced because the circumstances of the case are completely different and the legal analysis inapplicable. In *Matter of S.C.*, two Indian children, five and six years old, were removed from their non-Indian mother after criminal child abuse charges were filed against her. *Id.* at 1251. The children were placed in an *Indian* foster home. The mother had never married the Indian father and had retained sole custody of the children since their birth. *Id.* at 1251. The Indian father had little contact with the children. *Id.* at 1252. The father and tribe appeared in the proceeding after receiving notice under the ICWA. *Id.* at 1251. The tribe, after conducting a home study, did not recommend placement with the Indian father but only that he be given visitation rights. *Id.* at 1252. The court held, relying on its prior decision in *In re D.M.J.*, 741 P.2d 1386 (Okla. 1985), that where the children had lived away from their Indian family for years, the ICWA would not be applicable. *Id.* at 1255-56.

The Petitioners rely on cases where the court was asked to apply the ICWA to children who had previously lived for many years with a non-Indian parent outside an Indian environment. *See also Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), *cert denied, sub nom., J.Q. v. D.R.L.*, 490 U.S. 1069 (1989), where the child's "entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture." *Id.* at 309.

The present case is more closely related to the prior Oklahoma Supreme Court decision in *Matter of Adoption*

of Baby Boy D, 742 P.2d 1059 (Okla. 1985). The court in *Baby Boy D* held the ICWA was applicable to newborn Indian children where the unwed father had acknowledged or established paternity through the tribal courts consistent with tribal custom or state procedures. *Id.* at 1064. In the present action, the Indian father had acknowledged paternity with the Tribe and through state procedures. The Idaho Supreme Court specifically held that paternity had been established. (13a-14a.) There are no state court decisions which sanction an exception to the application of the ICWA where an Indian parent, who has acknowledged paternity, or a tribe soon after the birth sought to place the child within an Indian community. The non-Indian mother and the Petitioners' actions are the sole reason that the child had not been given an opportunity to be part of his Indian culture and environment. The Idaho Supreme Court, at 14a., was correct in not condoning their efforts to avoid the Indian community and application of the ICWA.

> We are acutely aware that more than three years have elapsed since the child was placed with adoptive parents. We understand the difficulty and danger of removing a child of this age from the home in which the child has been nurtured during this formative period. We cannot ignore, however, that the termination of the father's rights and the placement of the child by adoption were accomplished without applying ICWA.

State court decisions requiring an "existing Indian family" before applying ICWA protections are best viewed as limited to a very narrow set of circumstances not present in this case. The overwhelming weight of

authority on the issue agrees with the analysis of the Idaho Supreme Court.

CONCLUSION

The Idaho Supreme Court ruling in this case merely requires state courts to carry out their responsibility under the ICWA to determine the applicability of the Act. The Idaho Supreme Court has followed this Court in rejecting state court exceptions to the application of the ICWA. No state court has advanced any consistent rationale which should cause this Court to reexamine either its own previous ruling in *Holyfield* or the Idaho Supreme Court ruling in this case. Finally, the Idaho court's decision is in accord with the well-established "Indian law" canon of construction adhered to on many occasions by this Court, that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 79 (1918). In light of this Court's recognition in *Holyfield* that the ICWA is intended to protect Indian tribes as well as the best interests of Indian children by promoting placement of such children within their tribes and communities, liberal construction of ICWA requires the result reached by the Idaho Supreme Court. *Holyfield*, 490 U.S. at 49-50.

For these reasons, Respondent prays that the petition for certiorari be denied.

Respectfully submitted,

HOWARD A. BELODOFF
Counsel of Record
Idaho Legal Aid Services, Inc.
P.O. Box 913
Boise, Idaho 83701
(208) 336-8980

ROBERT J. MCCARTHY
Idaho Legal Aid Services, Inc.
P.O. Box 973
Lewiston, Idaho 83501
(208) 743-1556

Counsel for Respondents

UNDERWOOD and STEELE Ctd.
CAROLYN SENECA STEELE
605 West Franklin Street
P.O. Box 387
Boise, Idaho 83701
Telephone: (208) 342-6532

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF CANYON
MAGISTRATES DIVISION

In the Matter of the Adoption of BABY BOY DAVIS, A Minor Child.	Case No. SP-89-01116 NOTICE TO PARENT (Filed Jan. 18, 1990)

To: Jeff Nothelphim
P.O. Box 258
Oglala, South Dakota 57764

Pursuant to Section 104 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1912 et seq.), and in accordance with the guidelines for State Court-Indian Child Custody Proceedings, published in the Federal Register, 44-FR-228 (1979), petitioners give notice to Jeff Nothelphim of their petition to adopt the above-named child pursuant to I.C. 16-2004 (c) before the Magistrate's Court, Canyon County, State of Idaho, and provides to Jeff Nothelphim the following information:

UNDERWOOD and STEELE Ctd.
CAROLYN SENECA STEELE
605 West Franklin Street
P.O. Box 387
Boise, Idaho 83701
Telephone: (208) 342-6532

Attorneys for Petitioners

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF CANYON
MAGISTRATES DIVISION

In the Matter of the Adoption of BABY BOY DAVIS, A Child Under Eighteen Years of Age.	Case No. SP-90-00106 SP-89-01116 ORDER OF ADOPTION (Filed June 19, 1990)

This matter concerning the adoption of BABY BOY DAVIS, came on for hearing before this Court at 11:00 o'clock A.M. on the 14th day of June, 1990, and Leland Swenson and Karla Swenson, husband and wife, having appeared before me in person; and evidence having been introduced and submitted to the Court, the Court enters its findings, conclusions and Order:

I.

That the Petitioners are Leland Swenson and Karla Swenson, husband and wife;

II.

That BABY BOY DAVIS, the child of Brenda Ann Davis and Jeffrey Nothelphim, was born out of wedlock;

III.

That the natural father Jeffrey Nothelphim's parental rights were terminated on the 21st day of May, 1990, in the above-named court;

IV.

That said minor child has lived with and been in the custody and control of the petitioners since September 19, 1989, and that petitioners have provided all of the care and support for said minor child, in the County of Canyon, State of Idaho, since that date;

V.

That the legal name of the said child shall be KENNETH CASEY LEON SWENSON;

VI.

That the petitioners herein agree to adopt said child and to give said child all the rights and privileges he is

entitled to as the lawful child of the petitioners including the rights of inheritance;

VII.

That the petitioners have the means and ability to properly support and care for said child, all to the child's benefit.

WHEREFORE, IT IS ORDERED AND DECREED and this does ORDER AND DECREE:

That said adoption is in the best interest of the above-named minor child and that said minor child is hereby and shall henceforth be regarded as legally adopted by Leland and Karla Swenson and shall be regarded and treated in all respects as the lawful child of Leland and Karla Swenson, husband and wife, and that henceforth the said minor child, BABY BOY DAVIS, shall be known as KENNETH CASEY LEON SWENSON, and that the said petitioners, Leland and Karla Swenson and the said minor child Kenneth Casey Leon Swenson shall sustain toward each other the legal relationship of parent and child, subject to all duties and rights of that relationship, including the rights of inheritance, support and protection.

DATED this 14th day of June, 1990.

/s/ Gary D. DeMeyer
Gary D. DeMeyer, Magistrate

CONSTITUTION AND BY-LAWS OF THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA

Preamble

We, the Oglala Sioux Tribe of the Pine Ridge Indian Reservation, in order to establish a more Perfect organization, Promote the general welfare, conserve and develop our lands and resources, secure to ourselves and our posterity the power to exercise certain rights of home rule not inconsistent with federal laws and our treaties, and in recognition of God Almighty and His Divine Providence, do ordain and establish this constitution for the Oglala Sioux Tribe.

Article 1 – Territory

The jurisdiction of the Oglala Sioux Tribe of Indians shall extend to the territory within the original confines of the Pine Ridge Indian Reservation Boundaries, as defined by the act of March 2, 1889 (25 Stat. L. 888), and to such other lands as may be hereafter added thereto under any law of the United States except as may be otherwise provided by law for unrestricted lands.

Article II – Membership

Section 1. The membership of the Oglala Sioux Tribe shall consist as follows:

(a) All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935, provided, that correction may be made in the said rolls within five years from the

adoption and approval of this constitution by the tribal council subject to the approval of the Secretary of Interior.

(b) All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children.

Section 2. The tribal council shall propose by-laws covering future membership and the adoption of new members.

Oglala Sioux Tribe

Department of Enrollment

Box H
Pine Ridge, South Dakota 57770-2070
Phone 605/867-1321 Ext. 244

June 12, 1992

I HEREBY CERTIFY THAT ALEX DAVIS (AKA BABY BOY DAVIS), IS LISTED ON THE PINE RIDGE INDIAN RESERVATION CENSUS LEDGER, ESTABLISHED 1908 (revised 1956), AN OFFICIAL RECORD OF THIS AGENCY, AS BEING ½ DEGREE OGLALA SIOUX INDIAN BLOOD, WITH ROLL NO. U-33586 AND WAS BORN SEPTEMBER 18, 1989 IN HEALDSBURT, CALIFORNIA TO BRENDA DAVIS (MOTHER) AND ARCHIE (AKA JEFFREY) NOT HELP HIM (FATHER).

I FURTHER CERTIFY THAT THE COPY OF THE OFFICIAL RECORD ATTACHED HERETO IS A TRUE AND ACCURATE COPY OF OUR MEMBERSHIP ROLL.

/s/ Joan Decker
ENROLLMENT DIRECTOR

422-a 5/8

½ u-33586 Davis, Alex (B. 09-18-89)M.*

I hereby certify that this is a true and exact copy of the document on file at the Pine Ridge Agency. Dated this 12th day of June, 1992.

/s/ Joan Decker
Enrollment Director